Doretti Resources Sdn Bhd v Fitters Marketing Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — INTELLECTUAL PROPERTY SUIT NO 22IP-31–06 OF 2015
AZIZAH NAWAWI J
3 MARCH 2016

Trade Marks — Registered trademark — Action for infringement — Plaintiff found that first and second defendants kept fake plaintiff's products in warehouse — Fourth and fifth defendants supplied alleged fake products to first and second defendants — Plaintiff commenced action for infringement of trademark against defendants — Fourth and fifth defendants applied to strike out plaintiff's action — Whether use of trademark by fourth and fifth defendants cause confusion to members of public — Whether use of mark by fourth and fifth defendants importing reference to plaintiff thereby induced members of public to believe goods were plaintiff's — Trade Marks Act 1976

The plaintiff was the registered owner of the trademark 'PYRO' and the first and the second defendants were the plaintiff's customers which sold the products bearing the 'PYRO' trademark to the members of the public. Problem arose when plaintiff found that the first and second defendants had kept a large number of fake 'PYRO' products in their warehouse. Based on the purchase and delivery orders, the fourth and fifth defendants were the suppliers of the fake 'PYRO' products. Consequently, the plaintiff commenced an action for infringement of trademark against the defendants. In the present action, the fourth and the fifth defendants applied to strike out the plaintiff's claim on grounds that based on the plaintiff's pleaded case, there was no reasonable cause of action or that the claims were frivolous or vexatious and an abuse of the process of the courts. The issues for court's decision were: (a) whether the use of the identical or nearly resembling the plaintiff's registered trademark 'PYRO' by the fourth and fifth defendants was likely to deceive or cause confusion; and (b) whether the fourth and fifth defendants had used the 'PYRO' mark in such a manner as to render use likely to be taken either as being used as a trademark or as importing a reference to the registered proprietor or the registered user or to their goods or services.

Held, allowing the applications with costs:

(1) On the plaintiff's pleaded case against the fourth and the fifth defendants, there was no issue of deception and confusion on the ordinary consumers as the supplies of the allegedly fake 'PYRO' products by the fourth and the fifth defendants to the first and the second defendants were based on purchase orders and delivery orders. Thus, the

fourth and fifth defendants did not sell their products to members of the public which may lead to deception and confusion (see para 23).

(2) It was not the pleaded case of the plaintiff that the fourth and the fifth defendants' use of the mark 'PYRO' as importing a reference to the plaintiff, thereby inducing the purchasers to believe that the goods they were selling were the goods of the plaintiff. The general public was not involved in the transactions between the defendants. As such, based on the plaintiff's pleaded case, the plaintiff's claims against the fourth and fifth defendants were obviously unsustainable (see paras 26–27).

(3) Premised on the common law cases, the mere act of supplying the infringing products to the retailers does not amount to trademark infringement as they were not supplying the infringing products to the members of the public. In application to the present case, the fourth and fifth defendants' supplies were based on purchase orders from the first and second defendants, the retailers who then sold the allegedly infringing products to the members of the public (see para 37).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar cap dagangan 'PYRO' dan defendan pertama dan kedua adalah pengguna-pengguna plaintif yang menjual barangan yang mempunyai cap dagangan 'PYRO' kepada orang ramai. Masalah berbangkit apabila plaintif mendapati yang defendan pertama dan kedua telah menyimpan sejumlah besar barangan tiruan 'PYRO' di dalam gudang mereka. Berdasarkan atas pesanan pembelian dan penghantaran, defendan keempat dan kelima adalah pembekal-pembekal barangan tiruan 'PYRO'. Akibatnya, plaintif memulakan tindakan untuk pelanggaran cap dagangan terhadap defendan-defendan. Dalam tindakan ini, defendan keempat dan kelima memohon untuk membatalkan tuntutan plaintif atas alasan bahawa berdasarkan kes pli plaintif, tidak terdapat kausa tindakan yang munasabah atau bahawa tuntutan adalah remeh dan menyusahkan dan penyalahgunaaan proses mahkamah. Isu-isu untuk keputusan mahkamah adalah: (a) sama ada penggunaan cap dagangan yang sama atau hampir serupa dengan cap dagangan berdaftar 'PYRO' plaintif oleh defendan keempat dan kelima adalah mungkin untuk menipu atau menyebabkan kekeliruan; dan (b) sama ada defendan keempat dan kelima telah menggunakan tanda 'PYRO' dalam cara sebagai untuk menyebabkan penggunaan mungkin akan dikira sama ada sebagai digunakan sebagai cap berdaftar atau sebagai memberikan rujukan kepada tuan punya berdaftar atau pengguna berdaftar atau kepada barangan atau perkhidmatan mereka.

Diputuskan, membenarkan permohonan-pernohonan dengan kos:

(1) Atas kes yang diplidkan oleh plaintif terhadap defendan keempat dan kelima, tidak terdapat isu penipuan dan kekeliruan ke atas

pengguna-pengguna biasa kerana bekalan barangan tiruan 'PYRO' yang didakwa tersebut oleh defendan keempat dan kelima kepada defendan pertama dan kedua adalah berdasarkan atas pesanan belian dan pesanan penghantaran. Oleh itu, defendan keempat dan kelima tidak menjual barangan mereka kepada orang awam yang mungkin membawa kepada penipuan dan kekeliruan (lihat perenggan 23).

(2) Ia bukan kes yang diplid oleh plaintif bahawa penggunaan tanda 'PYRO' oleh defendan keempat dan kelima sebagai memberikan rujukan kepada plaintif, dengan itu menyebabkan pembeli-pembeli mempercayai bahawa barangan yang dijual mereka adalah barangan plaintif. Orang awam tidak terlibat dalam transaksi di antara defendan-defendan. Dengan itu, berdasarkan kes yang diplid plaintif, tuntutan plaintif terhadap defendan keempat dan kelima adalah jelas tidak boleh dikekalkan (lihat perenggan 26–27).

(3) Berdasarkan kes-kes *common law*, tindakan semata-mata membekalkan barangan yang salah tersebut kepada peruncit tidak merupakan perlanggaran cap dagangan kerana mereka bukan membekalkan barangan salah kepada orang awam. Dalam permohonan kepada kes ini, bekalan defendan keempat dan kelima adalah berdasarkan atas pesanan belian daripada defendan pertama dan kedua, peruncit-peruncit yang kemudiannya menjual barangan yang didakwa salah kepada orang awam (lihat perenggan 37).]

Notes

For cases on action for infringement, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2827–2835.

Cases referred to

Acushnet Company v Metro Golf Manufacturing Sdn Bhd [2006] MLJU 412; [2006] 7 CLJ 557, HC (refd)

Amstrad Consumer Electronics plc v British Phonographic Industry Ltd [1986] FSR 159, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Belegging-en Exploitatiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd [1979] FSR 59, CA (refd)

Cadbury Ltd v Ulmer GmbH [1988] FSR 385, Ch D (refd)

Cadbury Schweppes Pty Ltd and others v Pub Squash Co Pty Ltd [1981] RPC 429, PC (refd)

Dunlop Pneumatic Tyre Company, Limited v David Moseley & Sons, Limited [1904] 1 Ch 612, CA (refd)

Leo Pharmaceutical Products Ltd A/S (Lovens kemiske Fabrik Produktionsaktieselskab) v Kotra Pharma (M) Sdn Bhd [2009] 5 MLJ 703; [2012] 10 CLJ 507, HC (refd)

Lim Yew Sing v Hummel International Sports & Leisure A/S [1996] 3 MLJ 7; [1996] 4 CLJ 784, CA (refd)
Townsend v Haworth (1875) 48 LJ Ch 770n, CA (refd)

Legislation referred to

Trade Marks Act 1976 s 38(1)

Jean Lew (Kit & Assoc) for the plaintiff.
Wilson Lim (Wilson Lim) for the fourth and fifth defendants.

Azizah Nawawi J:

INTRODUCTION

[1] There are two applications before this court:

(a) the fourth defendant's application (Muetech Sdn Bhd) to strike out the plaintiff's claim against it in encl (29); and

(b) the fifth defendant's application to strike out the plaintiff's claim against her in encl (31).

[2] The grounds of the applications are that based on the plaintiff's pleaded case against the fourth and the fifth defendants, there is no reasonable cause of action or that the claims are frivolous or vexatious and an abuse of the process of the courts.

THE SALIENT FACTS

[3] The plaintiff is the registered owner of the trademark 'PYRO' in Class 6, that is, ironmongeries of keys, locksets for doors and window, locks, lever handle etc.

[4] The first and the second defendants are the customers of the plaintiff who have ordered and bought the products bearing the 'PYRO' trademark from the plaintiff and sell the same to members of the public.

[5] In April 2015, the plaintiff visited the first and the second defendants' warehouse in Sg Buloh, Selangor and found that the first and the second defendants have stored a large number of products bearing the trademark 'PYRO' which are fake products, as they are not the plaintiff's 'PYRO' products. The plaintiff claimed that the fake products were kept together with the plaintiff's original 'PYRO' products.

[6] On 3 June 2015, the plaintiff lodged a complaint with the Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan ('KPDNKK').

[7] On 4 June 2015, together with the officers from KPDNKK, the plaintiff went to the first and the second defendants' warehouse and found that the first and the second defendants have kept a large number of fake 'PYRO' products at the warehouse.

[8] From the documents seized from the first and the second defendants, the purchase and the delivery orders, the plaintiff found out that the suppliers to the first and the second defendants of the alleged fake 'PYRO' products are the fourth and the fifth defendants.

[9] Hence, the plaintiff filed this action against all the defendants.

THE FINDINGS OF THE COURT

[10] It is common ground that this court will only strike out the plaintiff's claim if the claims are obviously unsustainable as decided by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36.

[11] With that principle in mind, I take note that the plaintiff's pleaded case against the first and the second defendants is that they have infringed the plaintiff's trademark by buying the infringing products from the third, fourth and the fifth defendants and sell the infringing products to their customers (see para 27(b) of the statement of claim).

[12] The plaintiff's pleaded case against the fourth and the fifth defendants is for trademark infringement, that the fourth and the fifth defendants have infringed the plaintiff's trademark 'PYRO' by supplying the fake products bearing the trademark 'PYRO' to the first and the second defendants, the retailers, who in turn sell their products to the public. This can be seen from paras 24 and 27(a) of the statement of claim, which reads:

> 24. Berdasarkan purchase order dan delivery order yang diperolehi pada masa pemeriksaan dan penyitaan, Plaintif mendapati bahawa Defendan Pertama dan Ke-2 memperolehi bekalan barangan ini daripada Defendan Ke-3, Ke-4 dan Ke-5.
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> ...
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> 27. Defendan-Defendan telah dengan niat melanggar cap dagangan 'PYRO' Plaintiff dan merugikan Plaintif di mana butir-butir adalah seperti berikut:
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> (a) *Defendan Ke-3, Ke-4 dan Ke-5 telah pada setiap masa yang berkenaan dengan niat melanggar cap dagangan 'PYRO' Plaintiff dan merugikan Plaintif membekalkan barangan yang sama jenis dengan Plaintif yang*

menggunakan jenama 'PYRO' Plaintif kepada Defendan Pertama dan Ke-2 walaupun Defendan Ke-3, Ke-4 dan Ke-5 mempunyai pengetahuan bahawa pada setiap masa yang berkenaan mereka bukanlah pemilik berdaftar cap dagangan 'PYRO'; dan

(b) *Defendan Pertama dan Ke-2 telah pada setiap masa yang berkenaan dengan niat melanggar cap dagangan 'PYRO' Plaintif dan merugikan Plaintif membeli stok — stok tiruan 'PYRO' daripada Defendan Ke-3, Ke-4 dan Ke-5 dan menjualnya kepada pelanggan-pelanggan Defendan Pertama dan Ke-2* walaupun mempunyai pengetahuan bahawa Defendan-Defendan pada setiap masa yang berkenaan bukan pemilik berdaftar cap dagangan 'PYRO'.

[13] It is not in dispute that based on the purchase orders and delivery orders, the fourth and the fifth defendants are the suppliers of the allegedly fake 'PYRO' products to the first and second defendants.

[14] The issue here is whether the sales and supplies of the allegedly fake 'PYRO' products by the fourth and the fifth defendants to the first and second defendants based on purchase orders and delivery orders, amount to trademark infringement under the Trade Marks Act 1976.

[15] Trademark infringement is provided for in s 38(1) of the Trade Marks Act 1976 ('the TMA 1976'), which reads as follows:

Infringement of a trade mark

38(1) A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or registered user of the trade mark using by way of permitted use, uses a mark which is identical with it or so nearly resembling it as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trade mark is registered in such a manner as to render the use of the mark likely to be take neither —

(a) as being use as a trade mark;

(b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular, or other advertisement, issued to the public, as importing reference to a person having the right either as registered proprietor or as registered user to use the trade mark or to goods with which the person is connected in the course of trade; or

(c) in a case in which the use is use at or near the place where the services are available or performed or in an advertisement circular or other advertisement issued to the public, as importing reference to a person having the right either as registered proprietor or as registered user to use the trade mark or to services with the provision of which the person is connected in the course of trade.

[16] Trademark infringement pursuant to s 38(1) of the TMA 1976 was

considered by Justice Low Hop Bing in *Leo Pharmaceutical Products Ltd A/S (Lovens kemiske Fabrik Produktionsaktieselskab) v Kotra Pharma (M) Sdn Bhd* [2009] 5 MLJ 703; [2012] 10 CLJ 507, where His Lordship opined that in order to prove infringement, it is incumbent upon the plaintiff to prove the following elements:

(a) the defendant is neither the registered proprietor nor the registered user of the trademark;

(b) the defendant used a mark identical with or so nearly resembling the plaintiff's registered trademark as is likely to deceive or cause confusion;

(c) the defendant was using the offending mark in the course of trade;

(d) the defendant was using the offending mark in relation to goods or service within the scope of the registration; and

(e) the defendant used the offending mark in such a manner as to render use likely to be taken either as being used as a trademark or as importing a reference to the registered proprietor or the registered user or to their goods or services.

[17] In the present case, it is not in dispute that element (a) identified by Justice Low Hop Bing in *Leo Pharmaceutical Products* case is satisfied as the fourth and the fifth defendants are neither the registered proprietor nor the registered user of the trademark 'PYRO'. Element (c) is also satisfied as the fourth and the fifth defendants are using the mark in the course of trade, in their business transactions with the first and the second defendants. Element (d) is also satisfied as the defendants were using the offending mark in relation to goods within the scope of the registration, in Class 6.

[18] The next issue is whether the plaintiff have shown that the fourth and the fifth defendants have:

(a) used a mark identical with or so nearly resembling the plaintiff's registered trademark as is likely to deceive or cause confusion — see (b); and

(b) used the offending mark in such a manner as to render use likely to be taken either as being used as a trademark or as importing a reference to the registered proprietor or the registered user or to their goods or services — see (e).

[19] With regards to element (b), the issue here is whether the use of the identical or nearly resembling the plaintiff's registered trademark 'PYRO' by the fourth and the fifth defendants, is likely to deceive or cause confusion.

[20] With regards to the issue of confusion, in *Lim Yew Sing v Hummel*

International Sports & Leisure A/S [1996] 3 MLJ 7; [1996] 4 CLJ 784, Justice Mahadev Shanker JCA said at p 19 (MLJ); p 797 (CLJ): A

> The element of confusion comes in when goods belonging to two different proprietors with similar marks are competing in the same market in the course of trade.

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[21] In *Acushnet Company v Metro Golf Manufacturing Sdn Bhd* [2006] MLJU 412; [2006] 7 CLJ 557, Justice Ramly Ali (as he then was) held as follows:

> It is not necessary that it should be intended to deceive or to cause confusion. We do not have to look into the mind of the user what he intended. It is its probable effect on ordinary people which we need to consider. The user may have no such intention, and was completely honest. *But he may still be guilty of infringement if his usage of the trademark is likely to deceive or to cause confusion on the ordinary people*, (see: *Parker-Knoll Limited v Knoll International Limited*). C D

[22] From the above cases, it would seem that the main concern behind s 38(1) of the TMA 1976 is to protect the ultimate consumers from deception and confusion. This happens when identical goods belonging to two different proprietors are competing in the same market in the course of trade and this is likely to deceive or to cause confusion on the ordinary consumers. E

[23] However, on the plaintiff's pleaded case against the fourth and the fifth defendants, there is no issue of deception and confusion on the ordinary consumers as the supplies of the allegedly fake 'PYRO' products by the fourth and the fifth defendants to the first and the second defendants are based on purchase orders and delivery orders. The fourth and the fifth defendants did not sell their products to members of the public which may lead to deception and confusion. As such, I am of the considered opinion that element (b) identified by Justice Low Hop Bing in *Leo Pharmaceutical Products* case has not been satisfied. F G

[24] Next is on element (e) identified by Justice Low Hop Bing in *Leo Pharmaceutical Products* case, that is, whether the fourth and the fifth defendants have used the 'PYRO' mark in such a manner as to render use likely to be taken either as being used as a trademark or as importing a reference to the registered proprietor or the registered user or to their goods or services. H

[25] The Privy Council in *Cadbury Schweppes Pty Ltd and others v Pub Squash Co Pty Ltd* [1981] RPC 429 held as follows: I

> The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and *he cannot, therefore be allowed to use the names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person*. (Emphasis added.)

[26] Again, it is not the pleaded case of the plaintiff that the fourth and the fifth defendants' use of the mark 'PYRO' as importing a reference to the plaintiff, thereby inducing the purchasers to believe that the goods they are selling are the goods of the plaintiff. In this case, it is not in dispute that the supplies of the allegedly fake 'PYRO' products by the fourth and the fifth defendants is only to the first and second defendants, and such supplies are based on purchase orders of the first and second defendants. The general public are not involved in the transactions between the defendants.

[27] As such, I am of the considered opinion that based on the plaintiff's pleaded case, the plaintiff's claims against the fourth and fifth defendants are obviously unsustainable and must be struck out with costs.

[28] Added to the above, I will now consider the submissions of the fourth and the fifth defendants on the legal position in common law. They relied on an English High Court judgment of *Cadbury Ltd v Ulmer GmbH* [1988] FSR 385 for the legal proposition that merely supplying the infringing products to distributors or retail outlets cannot amount to an act of infringement.

[29] The factual matrix of *Cadbury Ltd* case is similar to the instant case, where it involves the supply of goods to a retailer. The defendant made and sold bars of flaked chocolate which had substantially the same appearance as those of the plaintiff. The defendant had sold such bars for resale by retail outlets which sold the ice creams to the public. The plaintiff alleged that the defendant had deliberately and intentionally enabling and procuring retailers to sell its bars under the plaintiff's registered trademarks, thereby enabling and procuring infringement of trademarks. The defendant applied to strike out the plaintiff's claim and this was allowed by the court.

[30] In allowing the defendant's application to strike out the plaintiff's claim, Justice Falconer applied the following decisions of the English Court of Appeal:

(a) *Dunlop Pneumatic Tyre Company, Limited v David Moseley & Sons, Limited* [1904] 1 Ch 612;

(b) *Belegging-en Exploitatiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59; and

(c) *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159.

[31] In *Dunlop Pneumatic Tyre* the plaintiff's claim against the defendant is for patent infringement, where the defendant had manufactured outer detachable covers, which is covered by the plaintiff's patent, and had sold the

same to persons who, to the knowledge of the defendant intended to use the covers for the purpose of infringing the patent. The court finds that the plaintiff's pleaded case is not that the defendant have taken part in the infringement, but rather '... All that they complain of is the sale of these covers to persons who the defendants must have known to have intended to commit an infringement of one or other of the patent'.

[32] The issue before the court is 'Whether the selling of an article intended to the knowledge of the vendor to be used by the purchaser for the purpose of infringing a patent is an infringement of the patent'. The court held that it does not amount to an infringement. Stirling LJ held at p 620:

> I am of the *same opinion* ... [Townsend] decides that *the sale of the covers would not become an infringement merely because the vendor knew the purchaser intended to use the article sold to him for the purpose of infringing the patent*.

Cozen Hardy LJ similarly held at p 621:

> Townsend is a decision of [CA] which is binding on us, that there is *no infringement of the patent by the defendants, even though they sell the covers with knowledge that the purchaser intents afterwards to use them for the purpose of infringement* ... (Emphasis added.)

[33] The same position was taken by the Court of Appeal in *Belegging* case. In this case, the plaintiff owned a patent for diamond grit coated with metal of a specified thickness and embedded in a resin bond. The defendants were in the business of selling metal coated diamond grit. The plaintiff sued the defendants for infringement and for procuring and/or aiding infringement. The defendants filed an application to strike out the statement of claim as disclosing no cause of action. In allowing the defendant's application, the court said this:

> ... So apart from the Patents Act 1977, to which I shall come later, *to supply that commodity cannot of itself constitute an infringement: Townsend v Haworh* (1875) 48 LJ Ch 770n; *Dunlop Pneumatic Tyre Co Ltd v D Moseley & Sons Ltd* (1904) 21 RPC 274. In the former of these two cases Mellish LJ stated the principle tersely and forcefully as follows: *'Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even though the party who sells it knows that he is going infringe it and indemnifies him, does not by itself make the person who so sells an infringer ...* (Emphasis added.)

[34] The last case referred by Justice Falconer in *Cadbury Ltd* is the *Amstrad* case. In this case, Amstrad was a manufacturer of audio systems which could record cassette tapes and it only sold its audio systems to distributors. The defendant alleged that Amstrad was, among others, procuring copyright infringement by those using their audio system, a joint tortfeasor to those who had infringed copyright using their audio system and authorising copyright infringement by the usage of their audio system. Lawton LJ held at pp

206–207:

> The *Dunlop* case is, of course, binding on us. Whether a supplier of goods is an infringer of either a patent or someone's copyright will depend upon the evidence; but *mere supplying with knowledge and intent will not be enough to make the supplier himself an infringer or a joint tortfeasor with someone who is* ... Patentees and the owners of copyright have the rights given them by statute and no others. Those who infringe those rights are penalized. Act short of infringement are not. *Amstrad's supplying therefore was not an act of infringement*.
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> ...
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> In my judgment, Amstrad are in the same position as the hirer of the gramophone was in the *Vigneux* case. *Once they had sold their models (and they sold only to the retail trade) they had no control over how they were used*. (Emphasis added.)

[35] In *Amstrad* case, Slade LJ after agreeing to the judgments of *Townsend, Dunlop* and *Belegging* further held at p 213:

> ... I might add that the *correctness that Amstrad is not a party to the relevant infringements is even more apparent when it is remembered that Amstrad does not itself sell its machines direct to the members of the public but only to the trade*. (Emphasis added.)

[36] The above cases deals with patent and copyright infringement. However, Lord Falconer applied the above principles to trademark infringement and held at p 404 in *Cadbury Ltd*:

> Although the Court of Appeal was there dealing with alleged infringement of copyright, that is in *Amstrad* case, it seems to me that the passages to which I have referred *are equally applicable to the case of alleged infringement of registered trade marks pleaded against the defendants in the present case*, that is alleged infringement as a joint tortfeasor with the ultimate ice cream retailers, to whom it does not sell its fake chocolate bars and whom may not even know, and/or as procuring, inciting or enabling such ice cream retailers to infringe the plaintiff's trade marks ...
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> *In my judgment, therefore, the plaintiff's case directed at infringement of registered trade mark, as pleaded in the amended statement of claim, must fail* ... (Emphasis added.)

[37] Premised on the common law cases above, I agree with the submission of the fourth and the fifth defendants that in this case, where the plaintiff has pleaded that the fourth and fifth defendants have committed trademark infringement by supplying the fake 'PYRO' products to the first and the second defendants, the mere act of supplying the infringing products to the retailers (the first and the second defendants) does not amount to trademark infringement as they were not supplying the infringing products to the members of the public. The fourth and the fifth defendants' supplies are based on purchase orders from the first and the second defendants, the retailers who then sells the allegedly infringing products to the members of the public.

[38] Therefore, premised on my reasons above, I will allow both applications with costs.

Applications allowed with costs.

Reported by Dzulqarnain Ab Fatar